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File No. O Leases 43

Legal Department
A **BRANCH**

Subject:— Opinions in Connection with the Leases

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File No. O Leases/43

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C O N T E N T S.

Legal Department File No. O. Leases /53

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3.	7510 / 20.7.~~1943~~ 1(4)	5351 / 6-8-1943	Breach of obvenents made by Mr. P.D.Mahalaxmiwalla, a lessee of Back Bay Reclamation Plot No.140 in erecting a builidng on the said plot.	5-12
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Office of the R.L.A.

Under condition 18 of the lease read with calsue(f) of section 108 of the Transfer of Property Act notice or direction to the lessor to carry out the repairs within a certain time would be necessary to entitle the leasee to ~~claim~~ claim the cost of repairs. These being no such notice or direction to the lessor to carry out the repairs to the water storage tank in the present case, Government would not be entitled to claim the cost of repairs. Moreover it is very doubtful whether the water storage tank coule be included in the buildings within the meaning of condition 15 of the lease.

Id/-P.N.M.
27-3-

Remembrancer of Legal Affairs.

M.R.D. 11.7.56 C.4

U.R. to R.D., No. 2298 dated the 29th March 1943.

R.D.No 570 27-4-43

As the lease of Rs Kalyani's bunglow does not create any desire in favour of the Govt. of Bombay for any fixed period and as the desire under that lease is on a monthly tenancy only the proper course would be to end this tenancy by giving the requisite notice and request R.S.Kalyani to enter into a fresh lease with the G.of I. direct.

2. As regards the lease in respect of R.B. Mutha's bunglow, P.& S.D. is requested to forward a copy of the same to this office together with a draft of transfer deed.

Id/-
7-5

Sol.
Id/-
11-5

Id/-
11-5

Sol.
Id/-
11-5

M.R.D.
11-7-56
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U.R. to P.&S.D.No.3481 Dt.12-5-43

ADVOCATE GENERAL'S CHAMB
High Court,
Bombay, 5th July, 1943.

Subject:- LANDS: BOMBAY.
Back Bay Reclamation Area,
Lease of Plot No.140, Block No.II-
to Mahalaxmiwala, Mr. Festonji D.

O P I N I O N.

The agreement for lease in respect of Plot No.140 which is dated 9th September 1938 is different from the agreement for lease in respect of Plot No. 135 dated 8th March 1937. The latter agreement contemplated a lease being given only after the erection of the buildings. The agreement of 1938 obviously contemplated a lease being given before completion of the building. Compare the difference in the wording of clause 5 of the agreement of 8th March 1937 with the wording of clause 6 of the agreement of 8th September 1938. I do not knwo whether the building on Plot 140 had at all been commenced or how far it had progressed, when one lease in respect of both the plots was given to the lessee on the 30th of March 1939. In any event the lease expressly provides that so far as plot 140 is cocerned it was given upon condition that if and whenever any building shall be built thereon, the same shall be built in strict accordance with the provisions of the agreement and the Building Rules thereto annexed, so far as the same related to the same and are capable of taking effect. The relevant covenants in the lease are those contained in Caluse 2(f),(g),(h)and(i). There may be some doubt as regards the covenant in Clause 2(h), which provides that no building or erection to be erected hereafter shall be commenced until plans are submitted and approved. If the erection of the building had been commenced before the lease of Plot No.140 was granted, it is very doubtful whether Government can say that this covenant has been broken by the lease. The other covenants however are clear. The relevant Building Rules, which the lessee covenanted to follow, are Rules, 5,6 and 9. Rule 5

Rule 5 in my opinion presents the same difficulty as the covenant in clause 2(h). The other Rules mentioned above, however, are clear.

In the draft notice (page 101) the breches on the lessee's part are said to be three:viz(1) erecting and completing the building without having the plans approved,(2)the height of the top floor being only 10feet 6 inches instead of 11 feet as shown on the plan and(3)the erection of two small rooms on the terrace floor, which are also not shown on the plans which were submitted. In the notice given to the lessee's Architect on the 30th of November 1942(page 81 of the file) two furthere breaches are mentioned: viz, that the projection of the balcony in 4x feet 3 inches instead of 4 feet and the promjection of the parapet wall marked'P' is not 4 feet but more. It is not stated what the excess projection is. I think it is clear that the lessee has committed a breach of the covenants and conditions in the lease in respect of (1) the erection of the two rooms on the terrace floor,(2) the height of the top floor being only 10 feet 6 inches instead of 11 feet and(3)the projection of the balcony being more than what was allowed and (4) the projection of the parapet wall being more than what was allowdd.

The question is whether Government is in the events that have happend eititled to forfeit the lease by reason of the breaches of the said covenants. Section 112 of the Transfer of Property Act provides that a forfeiture is waived by acceptance of rent which has become due since the forfeiture or by distress for any such rent or by any other act on the part of the lessor showing an intention to treat the lease as subsisting. I do not know the exact date when each of the breaches of the covenants aforesaid came to the knowledge of the lessor. If the breaches were known to the lessor before the 30th of September 1941 there can be no doubt that forfeiture in respect of such breaches as were known to the lessor before that date has been waived. The letter of 18th December 1941(Page 37 of the file), expressly mentions the breaches in respect of the erection of the two rooms on the terrace floor. The notice of 30th November 1942(Page 81 of the file) mentions also the projection of the balcony and of the parapet wall. It appears that on the 26th January 1943 a

a cheque was sent to the Collector of Bombay for the ren in respect of the last quater of 1941 and for the whole of the year 1942. This cheque was kept by Government and in the letter of 18th February 1943(Page 93 of the file) the Collector stated that the amount had been kept in the Suspense Account and would not be credited to Land Revenue unless the plans and specifications in respect of plot 140 were approved by the Chief Engineer to Government and the breaches of the lease covenants were remedied.

The question is whether the acceptance of the rent in the manner aforesaid amounts to a waiver of foreitures.
It has been held that an acceptance of the rent will be accepte as a waiver of the forefeiture, even if such rent is accepted under protest or without prejudice to the forefiture. The leading case on the point is Devenport v. Queen 1877 3 A.C. page 115 at page 131. See also the case of Strong v. Stringer (1889) 61 Law Times Page 470. The case nearest to the present one is that reported in I.L.R. 9 Cal. Page 843-Kali Krishna had-been-made-to the-lessor by-the lessees Tagore v. Fazlealı Chaudhri and ors. There the payment had been made to the lessor by the lessees and they were accepted as rent, but w kept in suspense subject to payment by the lessees of the remai ing amount and it was held that the lessor had waived his right to insist on re-entry by reason of the lessees' breach of covenants. In the present case the amount was paid as rent and was accepted as rent, but was kept insuspense, until the pla and specifications were apppoved of and the breaches of the covenants were remedied. At the date on which rent was so paid and accepted all the breaches mentioned above were within the kn knowledge of the lessor. In R.V. Paulson 1921 1 A.C.Page 271 rent was accepted conditionally pending a decisions upon an application by the lessee for a further extension of time, in which to carryout a covenant on his part. It was held tha such acceptance amounted to a waiver of the forefeiture.

I am therefore of opinion that Government have waived

P.T.O

the forefriture and is not entitled to re-enter on the premises, beaause of the breaches of the covenants aforesaid.

Thas, however, does not mean that Government is without any other remedky. The breaches of the covenants or the performance of the covenants have not been waived; only forfeiture has been waived. It is open to Government to claim damages from the lessee for the breches of the covenants or an injunction to restrain their breachm. In this case the rooms have already been erected, the top floor of less height than was required has already been erected and the balcony and parapet wall have already been projecthaveed beyond the legitimate limit. The injunction would, therefore, have to be in a mandatory form. In other words the claims by Government would be for specific performance of the covenents. A decree for specific performance of a covenant will only be made in a case where damages would be an inadequate remedy and the thing to be done is of such a nature that the Court can effectually compel its performance. Moreover, when equitable relief as distinguished from legal relief is being sought, equitable as distinguished from legal defences are to be considered.

Acquiescence on the part of the lessor or delay in seeking relief will, after lapse of what is in the circumstances a sufficient time, amount to a waiver on his part and preclude him from obtaining relief.

In the circumstances of this case I think it is doubtful whether specific relief will be given to the lessor by a mandatory injunction directing the lessee to increase the height of the top floor or to reduce the projection of the balcony and the parapet or by removal of the two rooms on the terrace floor. The Court will take into consideration the relative damage and inconvenience to the lessor as well as what the specific performance of the covenant would mean to the lessee. If the projection of the balcony and the parapet is very slight, the Court would be reluctant to decree specific performance if that means that the lessee will have to damange his building to a considerable extent to doing so. As regards the erection of the two rooms on the terrace floor the same consideration would apply, but perhps to a less extent; so too as regards the height of the top floor. To increase the height would now mean

to increase the height would now mean pulling down the terrace in order to raise the height of the top floor. I notice the in one letter the lessee's architects asked the Chief Engineer to note that the height of the top floor was 11 feet and not 19 feet 6 inches. I take it that as a matter of fact the height is 10 feet 6 inches.

As regards damages it will be difficult for the lessor to show any substantial damage arising from the breaches of these covenants.

In my opinion for the reasons above stated Government will not succeed in a claim for forfeiture. It is doubtful whether the covenants will be ordered to be specifically enforce by a mandatory injunction. The Government is entitled to claim dam Butx ti will have to prove the damages suffered by it. Of cou nominal damages will always be given. Even substantial damage will be given. But I do not think that will amount to a large figure. It is for Government to decide what course it chooses to adopt.

I amy mention that it is not open to Government to inflict a penalty on the lessee for the breach of the covenan It is possible however, that in order to avoid an action for damages or for specific performance of the covenants, the les may agree to pay a reasonable amount as compensation for the breach of the covenants and Government may agree on such pay to condone and waive the breaches.

Sd/- N.P.Engineer,

Advocate General

5th July 1943.

M.R.D.
11-7-56
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7701
28-7-43.

Submitted.

Survey No 98 of Mahableshwar in which the property known as "Upna Cottage" is situated had been leaqed out by Government to Bai Cooverbai Sorabjee Dubash for a period of 30 years from 29th October 1937. According to clause 2(n) of the lease, she applied to the Collector on 18th May 1942 for permission to transfer the property to the name of her mother and brother. The collector granted the permission on condition that on exprity of the present lease the assignees should undertak to execute a fresh lease in the form then current. The lessee did not accep this condition and the Collector therefore revked the permission for the transfer of the property In the meantime the lessee completed the gift deed on 25th August 1942 and transferred the property to the name of her mother and brother.

The leassee contended through her solicitors that the Collector has no right to impose such onerous condtion. The Collector of Satara thinks that his action in imposing the said condition is based upon Government orders in (1) G.R.R.D.No.2291 dated 29th Feb.1908 and(ii) G.R.R.D.No. 4533 dated 15th May 1914 The Collector therefore suggests that the premises may be resumed for the commission of the breach of convenant 2(n) of the lease The Commr. C.D. is of opinion that the Collr's view that the property can be resumed for the commission of the breach does not appear to be correct. He is also of opinion that the condition imposed by the Collr. is not only of doubtful legality but is actually contrary to what has been followed by Govt. in the matter throughtout. He therefore recommends that the Collrs order should be upset with the further condition that the present lease shall teminated and the lessee shall execute a lease in the form now now in force. The Secy.R.D. proposes to modify the Collr's order and to grant the permission to transfer the lease . The R.L.A. is requested to advise.

R.R.D.
11-7-56
C.4

Office of the R.L.A.

Secretary, R.D.'s proposal in his note dated the 23rd July 1943 covers all that is necessary in this case.

Id/-P.N.M.

Remembrancer of Legal Affairs.

M.R.D. 11 C.6.4.56

U.R. to R.D. No. 5994dated the 7th September 1943.